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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

LOJACK CORPORATION, INC.,

Petitioner,

v.

THE SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent;

MIKE RUTTI et al.,

Real Parties in Interest.

B219647

(Los Angeles County
Super. Ct. No. BC381043)

ORIGINAL PROCEEDINGS in mandate. Marty Thornton House, Judge. Writ granted in part, denied in part.

Venable LLP, Dan Chammas and Noah Steinsapir for Petitioner.

No appearance for Respondent.

Righetti Law Firm, Matthew Righetti and John Glugoski for Real Parties in Interest.

In this wage and hour case we consider whether a prior adjudication of issues against plaintiff Mike Rutti in a federal action precludes a finding that he is an adequate class representative in a state action raising similar claims. We conclude that it does. We find no abuse of discretion in the court's order certifying the class, subject to the substitution of an appropriate class representative for the claims adjudicated against Rutti in the federal action.

FACTUAL AND PROCEDURAL SUMMARY

In 2006, real party in interest Mike Rutti filed a complaint against petitioner LoJack Corporation in federal district court (SACV06-0350 DOC (RNBx)) asserting claims for unpaid compensation and indemnification under the federal Fair Labor Standards Act (FLSA; 29 U.S.C. § 201 et seq.) and under California law. The action was brought on behalf of a nationwide class of LoJack technicians and a subclass of California technicians. The first claim for relief alleged LoJack violated the FLSA by failing to pay overtime when LoJack employees worked more than 40 hours in a week. The second claim for relief alleged LoJack violated the California wage orders by failing to pay overtime when employees worked in excess of 40 hours in a week or eight hours in a day; failing to provide meal periods and rest breaks; failing to indemnify employees for expenditures and losses; and failing to reimburse employees for vehicle maintenance. The third claim for relief alleged unfair labor practices in violation of California Business and Professions Code section 17200.

LoJack moved for partial summary judgment, seeking adjudication that Rutti was not entitled to compensation, under federal or California law, for: time spent commuting to and from work; on-call time; time spent cleaning his company vehicle; time spent maintaining and servicing his company vehicle; time spent transmitting job information to LoJack headquarters on a portable data terminal (PDT); time spent charting the route to his first work site; time spent cleaning his work clothes; time spent maintaining and purchasing his tools; and time spent traveling to, and waiting for, monthly meetings. LoJack also sought summary judgment on Rutti's request for indemnification for the cost

of work tools during the time he was earning at least twice the minimum wage; car washing expenses; and the cost to repair his company car. As to these indemnification claims, LoJack argued that “California law expressly permits an employee making at least twice the minimum wage to buy his own work tools, and considers LoJack’s indemnification obligation for automobile travel satisfied by providing a company car to Plaintiff.” LoJack did not move for summary judgment on the missed meal and break claims brought under Labor Code section 226.7.

Rutti moved for class certification shortly before LoJack filed its motion for partial summary judgment. The district court deferred ruling on the certification motion and proceeded to LoJack’s summary judgment motion. The court granted summary adjudication on Rutti’s claims for compensation for commuting, for time spent on-call, and for off-the-clock activities, including washing work clothes, washing and maintaining the company car, charting driving routes, and making daily PDT transmissions. The court granted summary adjudication on Rutti’s indemnification claims regarding expenses incurred washing the company car and repairing damage that was the product of his own recklessness. It granted summary adjudication under federal law on the compensation claim for purchasing and maintaining work tools, but held Rutti could proceed on his claim for indemnification for the purchase of tools under California law. The court dismissed his claims for compensation for time spent driving to the United Parcel Service (UPS) and organizing supplies because they were asserted for the first time in opposition to the summary judgment motion.

A week after the summary adjudication order, the district court issued an order to show cause why the remainder of the action should not be dismissed for lack of a federal question. The show cause order stated: “The only remaining claims are state law causes of action for (1) indemnification of expenditures for the purchase and maintenance of work tools under Cal. Labor Code § 2802 and (2) remedies for missed meal and rest breaks under Cal. Labor Code § 226.7. The Court declines to exercise supplemental jurisdiction over the remaining state law claims in accordance with 28 U.S.C.

§ 1367(c)(3).” Rutti filed no response to the order, and the court dismissed the action without prejudice for lack of subject matter jurisdiction.

Rutti appealed to the Ninth Circuit, but he did not challenge the district court’s rulings against him with respect to time spent washing his work clothes, washing and maintaining the company car, driving to UPS, organizing supplies, purchasing and maintaining work tools, and commuting to and waiting for meetings. In *Rutti v. LoJack Corporation, Inc.* (2009) 578 F.3d 1084, the Ninth Circuit upheld the district court’s ruling on all but one of the claims—the claim for compensation for time spent on mandatory daily PDT transmissions. The court held the transmissions appeared to be integral to Rutti’s principal activities, and there was a triable issue of fact whether or not the time spent on the transmissions was *de minimis*, and hence not compensable. (*Id.* at p. 1096.) The Ninth Circuit remanded the cause to the district court for resolution on this claim; in all other respects, the grant of partial summary judgment was affirmed. (*Id.* at p. 1099.)

While the appeal was pending in the Ninth Circuit, Rutti and another LoJack employee, Gerson Anaya (collectively plaintiffs), filed this action in Los Angeles Superior Court on behalf of California LoJack technicians. They asserted state law claims for failure to provide meal and rest breaks and accurate wage statements; failure to indemnify for tools and vehicle maintenance; unpaid wages (including overtime wages); violation of the unfair competition law; and private attorney general penalties. Plaintiffs moved for class certification as to commute time, missed meal and lunch breaks, time spent on off-the-clock activities, daily overtime, and indemnification for purchase of work tools. On June 19, 2009, the trial court granted the motion for class certification on plaintiffs’ claims for denied meal periods up to the time LoJack changed its policy of sending jobs during lunch time; denied rest breaks; failure to indemnify for purchased tools; failure to pay daily overtime; failure to pay for: on-call time, time washing and maintaining company vehicles, PDT transmission time, time charting route to first job site, travel time to UPS, and time to purchase business-related tools; and on causes of action for waiting time penalties, violation of the unfair competition law, and private

attorney general penalties. The court denied certification as to claims for: denied meal periods after LoJack's change in policy; reimbursement for maintenance and repair of company vehicle; compensation for commute time and time traveling to company meetings; and compensation for time washing and maintaining uniforms.

LoJack filed a petition for writ of mandate (Case No B218294), asserting the trial court granted class certification without any explanation. We issued an alternative writ, directing the trial court to vacate its order certifying certain claims and to issue a new order "containing the court's rationale in certifying those claims and in appointing real party Mike Rutti as class representative, in particular: explaining for each certified claim whether common, rather than individual, issues predominate; whether the claim was fairly raised in plaintiffs' motion for class certification and why real party in interest Rutti is an appropriate class representative in light of the federal district court's decision and Ninth Circuit's opinion in *Rutti v. LoJack Corporation, Inc.* . . ." or to show cause for not doing so.

In response to the alternative writ, the trial court vacated its June 19 class certification order, and on September 24, 2009, issued an expanded order containing its rationale and discussing the adequacy of Rutti as class representative, the commonality of facts in the certified claims, and where the certified claims could be found in the complaint. LoJack filed this new petition for writ of mandate, challenging the substance of the court's order as to all claims except for daily overtime and indemnification for purchase of work tools. We issued an alternative writ and set the matter for oral argument on March 18, 2010.

On March 2, 2010, the Ninth Circuit granted rehearing of the appeal from the district court, withdrew its August 21, 2009 opinion, and filed a superseding opinion (*Rutti v. LoJack Corporation* (9th Cir. 2010) ____ F.3d ____ [2010 WL 699946]). The court vacated the district court's grant of summary judgment on Rutti's claim for compensation for his commute under California law, and again vacated the grant of summary judgment with respect to daily PDT transmissions. The case was remanded to the district court for further proceedings.

We asked the parties to file supplemental briefs, addressing the application of the recent Ninth Circuit opinion to the issues before this court. After consideration of the matter, we find no basis to grant the requested relief, except as to the adequacy of Rutti as class representative for certain claims, which we shall discuss.

DISCUSSION

I

Code of Civil Procedure section 382 authorizes a class action “‘when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court’” Class certification requires both an ascertainable class and a well-defined community of interest among class members.” (*Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 575.) “The ‘community of interest’ requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.” (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).)

The certification question is essentially procedural; the question is not whether an action is legally or factually meritorious, but whether “‘the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.’” (*Sav-On, supra*, 34 Cal.4th at p. 326, quoting *Collins v. Rocha* (1972) 7 Cal.3d 232, 238.)

A trial court’s ruling on a class certification motion is reviewed for abuse of discretion. (*Gattuso v. Harte-Hanks Shoppers, Inc., supra*, 42 Cal.4th at p. 575.) Trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, and are thus afforded great discretion in granting or denying certification. (*Sav-On, supra*, 34 Cal.4th at p. 326.) A trial court ruling supported by substantial evidence will not be disturbed unless the court used improper criteria or made erroneous legal assumptions. (*Id.* at pp. 326-327.) Any valid and pertinent reason stated by the

court will be sufficient to uphold the order. (*Id.* at p. 327.) With these precepts in mind, we turn to LoJack's three claims of error.

II

We first address the adequacy of the class representative. Two potential class representatives were named in the complaint, Mike Rutti and Gerson Anaya.

The adequacy of representation question examines conflicts of interest between named parties and the class they seek to represent. (*Capitol People First v. State Dept. of Developmental Services* (2007) 155 Cal.App.4th 676, 697.) “While it is true that the putative representative cannot adequately protect the class if his or her interests are antagonistic to or in conflict with the objectives of those he or she seeks to represent, a party's claim of representative status will only be defeated by a conflict that “goes to the very subject matter of the litigation.” (*Richmond v. Dart Industries, Inc.* [(1981)] 29 Cal.3d [462,] 470.)” (*Capitol People First v. State Dept. of Developmental Services*, *supra*, 155 Cal.App.4th at p. 697.) At the hearing on the class certification motion, the trial court disqualified Anaya, finding he had a conflict with the rest of the class based on allegations of criminal conduct. There is no challenge to that determination.

LoJack asserts in its writ petition, as it did in the trial court, that principles of collateral estoppel apply to preclude relitigation of issues resolved against Rutti in the federal action, making him an inadequate representative. Collateral estoppel precludes relitigation of issues argued and decided in a prior proceeding. (*Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1507.) There are five threshold requirements for its application: “First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.” (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 943, quoting *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.)

LoJack did not seek summary adjudication in the federal action on the claims under California law for compensation for missed meal and rest breaks, nor was there an adjudication as to Rutti's right to indemnification for purchased tools. The Ninth Circuit reversed the district court's grant of summary adjudication under California law on the compensation claims for time spent making daily PDT transmissions and the time commuting to the first job and from the last job. There is no issue preclusion against Rutti as to these claims.

The district court held that Rutti had no claim under federal or California law for reimbursement of car wash expenses or for deduction from wages for repairs to the company vehicle. It also held Rutti had no right to compensation for time spent washing work clothes under either federal or California law. In its ruling on the motion for class certification, the trial court correctly observed that Rutti was collaterally estopped from raising these claims in the state action, and he was therefore not an appropriate class representative as to these claims.

The district court held Rutti had no compensable claim for off-the-clock time spent commuting to and waiting for meetings, washing and maintaining the company vehicle, purchasing and maintaining work tools, and charting driving routes to his first job.¹ Rutti did not challenge these rulings in his appeal to the Ninth Circuit, and the district court decision was therefore final as to them. (See *Rutti v. LoJack Corporation, Inc.*, *supra*, ___ F. 3d at p. ___, fn. 4 [2010 WL 699946].) His claim for on-call time also was held noncompensable by the district court, and the Ninth Circuit treated the issue as waived for lack of adequate briefing. (*Rutti v. LoJack Corporation, Inc.*, *supra*, ___ F. 3d at p. ___, fn. 5 [2010 WL 699946].)

¹ The district court dismissed Rutti's claims for compensation for time spent driving to UPS and organizing supplies because they were asserted for the first time in opposition to the summary judgment motion. These claims were not "actually litigated" in the district court, nor were they reviewed by the Ninth Circuit, and thus there is no prior adjudication for collateral estoppel purposes. (See *Lucido v. Superior Court*, *supra*, 51 Cal.3d at p. 341.)

In considering Rutti's adequacy as a class representative, the trial court noted that the district court order was unclear whether the ruling was made under California law in addition to federal law, and the Ninth Circuit decision provided no clarification on the question. The trial court gave Rutti "the benefit of the doubt that the District Court's order was limited to federal law standards." Contrary to the trial court's statement, the scope of the district court's ruling can be inferred from its order to show cause re dismissal for lack of subject matter jurisdiction, which followed the grant of summary adjudication. The order states: "The complaint alleges federal question as its jurisdictional basis. *See* 28 U.S.C. § 1331. However, pursuant to the Court's order dated August 16, 2007, all federal law causes of action have been dismissed through summary adjudication. *The only remaining claims are state law causes of action for (1) indemnification of expenditures for the purchase and maintenance of work tools under Cal. Labor Code §2802 and (2) remedies for missed meal and rest breaks under Cal. Labor Code § 226.7.* The Court declines to exercise supplemental jurisdiction over the remaining state law claims in accordance with 28 U.S.C. § 1367(c)(3)." (Italics added.) Rutti filed no response to the order to show cause, and the district court dismissed the action. From this, we conclude that Rutti's off-the-clock claims were adjudicated against him under state and federal law, and he is thus collaterally estopped from relitigating them in the state action.

To summarize: principles of collateral estoppel preclude Rutti from pursuing claims for reimbursement for washing and repairing the company vehicle; for on-call time; for off-the-clock time spent: washing work clothes, commuting to and waiting for meetings, washing and maintaining the company vehicle, and purchasing and maintaining work tools, and charting driving routes to his first job. Rutti is an inadequate class representative as to these claims, and a suitable class representative must be named in order for this portion of the action to proceed. The federal adjudication does not bar Rutti from pursuing claims for compensation for missed meal and rest breaks; for reimbursement for purchased tools; for time spent: making PDT transmissions, driving

to UPS, and organizing supplies; and for commute time to and from work.² He may proceed as class representative on these remaining claims.

III

LoJack argues that the trial court erred in certifying claims for unpaid wages for time spent traveling to UPS locations, time spent purchasing tools, and time spent cleaning and maintaining company vehicles, as these tasks were either not mentioned or only briefly mentioned in the class certification motion. We find the pleading was adequate to support the court's inclusion of these tasks in its certification order.

In their motion for class certification, plaintiffs noted several issues properly suited to class-wide treatment, including: “Whether work known to be performed by LoJack *such as* charting routes, filling out paperwork and conducting the PDT transaction each day is compensable.” (Italics added.) They asserted that LoJack’s policy “is to pay its Techs ONLY for the time period starting when Techs arrive at their first job installation location (i.e., 8:00 a.m.) and ending when the Techs complete their final job installation of the day – excluding from hours worked the time spent performing other necessary work which occurs outside of this time frame.” Plaintiffs referenced an attached compilation of deposition testimony of LoJack employees which listed the type of work each employee performed off the clock. Several of the employee depositions excerpted by plaintiffs’ counsel specified uncompensated off-the-clock time spent washing and maintaining the company vehicle, going to UPS stores to pick up supplies, and purchasing work tools. These same categories of uncompensated off-the-clock time were specified in the employee declarations attached to the motion.

The pleadings and supporting evidence provided ample notice to LoJack that plaintiffs sought class certification for uncompensated off-the-clock time spent by class members performing several types of tasks, which included washing and maintaining

² This claim is not presently included in the charging pleading. In light of the Ninth Circuit’s recent opinion in *Rutti v. LoJack Corporation, Inc.*, *supra*, ___ F. 3d at p. ___ [2010 WL 699946], holding that California law does not preclude compensation for commute time, plaintiffs may seek leave to amend to add this claim.

company vehicles, purchasing tools, and picking up supplies at UPS stores. Declarations submitted by LoJack in opposition to the certification motion mention these same tasks, although the declarants state that the tasks are generally performed during work hours. Most importantly, at the hearing on class certification, LoJack argued the merits of certification on these tasks, with no claim that they were not included in the certification motion.³ The trial court did not abuse its discretion in including these tasks in its certification order.

IV

LoJack concedes that two of the claims—indemnification for tools and unpaid wages for daily overtime—were properly certified. As to the other claims, it argues that “The trial court both ignored the overwhelming evidence submitted by LoJack that demonstrated that individual issues would predominate, as well as certified claims without any evidence of the predominance of common issues.” We do not agree.

In its revised ruling on class certification, the trial court provided a detailed analysis of the predominance of issues which could be jointly tried versus those requiring separate adjudication. As to meal and rest breaks, the court itemized the common questions: “(i) Did Defendant provide 30-minute free of duty meal breaks? [¶] (ii) Did Defendant authorize and permit two 10-minute rest breaks? [¶] (iii) Did the class members not receive or missed their meal and rest breaks? [¶] (iv) Were their meal and/or rest breaks interrupted; (v) does such constitute an unfair business practice? [¶] (vi) What are the remedies?”

Plaintiffs presented deposition testimony of Julie Cummings, who was a Human Resources Generalist for LoJack. Ms. Cummings admitted LoJack had a system where jobs were continuously sent to employees, even during periods which otherwise would

³ This is in contrast to LoJack’s position on the issue of on-call time. At the hearing, LoJack argued that plaintiffs did not move for class certification for on-call time, and thus LoJack did not brief the issue in response. LoJack sought an opportunity to brief the issue, which the court granted. No such claim was raised as to the off-the-clock claims.

have been meal or break times. An internal LoJack email confirmed LoJack’s awareness of this problem as of October 2005. LoJack instituted a policy change in December 2006, so that for a 30-minute period each day, the continuous flow of jobs would stop and a meal period would be made available.

There was substantial, if disputed, evidence that in the period before this change, LoJack technicians often ate lunch in their vehicles, received work assignments and calls while eating lunch, or were too busy during the day to take a break from work. LoJack’s policy and practice during that time is relevant to the question of its compliance with the requirements for meal and rest breaks (see Lab. Code, §§ 226.7, subd. (b); 512).⁴ Proof of this policy would be common, and efficient, for all class members. The fact that its effect on each member might require individual proof does not preclude a finding of commonality. The question is whether the theory of recovery advanced by the plaintiffs is likely to prove amenable to class treatment, not whether there are potential individual issues of fact or law. “[T]he established legal standard for commonality . . . is comparative.’ ([*Sav-On*, *supra*,] at p. 339.) Specifically, ‘[t]he relevant comparison lies between the costs and benefits of adjudicating plaintiffs’ claims in a class action and the costs and benefits of proceeding by numerous separate actions—not between the complexity of a class suit that must accommodate some individualized inquiries and the absence of any remedial proceeding whatsoever. [Citations.]’ (*Id.* at p. 339, fn. 10)” (*Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1299.)

A reasonable court could conclude that issues respecting LoJack’s meal and rest break policy before December 2006 are likely to predominate over individualized calculations of actual meal and break time damages. (See *Sav-On Drug Stores, Inc. v. Superior Court*, *supra*, 34 Cal.4th at p. 331.) As the court explained in *Bufile v. Dollar*

⁴ Issues regarding the scope of an employer’s duty to ensure that employees take statutorily mandated meal and rest breaks are before the Supreme Court in *Brinker Restaurant Corp. v. Superior Court*, review granted October 22, 2008, S166350. A decision in *Brinker* could affect the merits of this case, but would not be determinative as to the commonality question for class certification.

Financial Group, Inc. (2008) 162 Cal.App.4th 1193, 1208, “Courts regularly certify class actions to resolve wage and hour claims. [Citations.] In this arena the class action mechanism allows claims of many individuals to be resolved at the same time, eliminates the possibility of repetitious litigation and affords small claimants with a method of obtaining redress for claims which otherwise would be too insignificant to warrant individual litigation.”

LoJack also challenges class certification of plaintiffs’ off-the-clock wage claims, arguing that the court failed to consider evidence submitted by LoJack. Plaintiffs submitted evidence that LoJack defined time worked as the time from arrival at the first job to the time of departure from the last job. They also submitted evidence of tasks that technicians were required to perform either before the start of the first job or upon arrival at home after the last job. Common questions predominate with respect to the compensability of these tasks. For example, on-call time “may be compensable if it is spent primarily for the benefit of the employer and its business.” (*Gomez v. Lincare, Inc.* (2009) 173 Cal.App.4th 508, 522.) This determination will require consideration of LoJack’s agreement with the technicians, and the degree to which the technicians are free to engage in personal activities while on call. (*Ibid.*) These questions appear to be common to all LoJack technicians.

LoJack argues that determining whether plaintiffs are entitled to compensation for time spent on PDT transmissions will require the fact finder to consider the de minimus doctrine. Generally, “employees cannot recover for otherwise compensable time if it is *de minimus*.” (*Lindow v. United States* (9th Cir. 1984) 738 F.2d 1057, 1062; *Gomez v. Lincare, Inc., supra*, 173 Cal.App.4th at p. 526.) But there is no reason that determination cannot be made for the class as a whole. Plaintiffs submitted the declaration of an expert in survey methodology, who explained that a survey could be designed and conducted which would provide reliable data from LoJack technicians as to whether they performed tasks for which they were not paid. This same survey methodology can be utilized to determine whether the time spent on PDT transmissions is de minimus, and thus not compensable.

As with the tasks already discussed, other off-the-clock activities required of LoJack technicians are subject to common proof. “Presuming in favor of the certification order, as we must, the existence of every fact the trial court could reasonably deduce from the record [citation], we cannot say it would be irrational for a court to conclude that, tried on plaintiffs’ theory, ‘questions of law or fact common to the class predominate over the questions affecting the individual members’ (*Washington Mutual [Bank v. Superior Court* (2001) 24 Cal.4th 906,] 913).” (*Sav-On, supra*, 34 Cal.4th at p. 329.)

DISPOSITION

Let a writ of mandate issue, directing the trial court to vacate the portion of its order finding that Mike Rutti is an adequate class representative as to the claims for reimbursement for washing and repairing the company vehicle, for on-call time, for off-the clock time spent: washing work clothes, commuting to and waiting for meetings, washing and maintaining the company vehicle, purchasing and maintaining work tools, and charting driving routes to his first job; and to issue a new order conditioning class certification of these claims upon the appointment of a new and adequate class representative. The remainder of the requested relief is denied. The parties are to bear their own costs in this writ proceeding.

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EPSTEIN, P.J.

We concur:

MANELLA, J.

SUZUKAWA, J.